IN THE

Supreme Court of the United States.

OCTOBER TERM, 1881.

GEO. C. RIVES, *Administrator de bonis non*, &c., of GEO. RIVES, *deceased*, *plaintiff in error*,

vs.

ANDREW J. FARISH, *Administrator de bonis non*, &c. of WILLIAM P. FARISH, *deceased*.

No. 156.

Brief of W. W. CRUMP & E. R. WATSON, Counsel for Appellants.

WHITTET & SHEPPERSON, PRINTERS, RICHMOND, VA.

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Statement of the Case.

On the 5th December, 1863, Geo. Rives and Geo. L. Peyton entered into the following contract, viz:

"I have this day contracted to sell and deliver on the place, on the 1st of January next, to Geo. L. Peyton, the above list of negroes—thirty-three in number, (the list is omitted, see record, pp. 3, 4,) the title thereto I warrant, but make no warranty of soundness. For the same negroes the said Geo. L. Peyton agrees to pay on delivery the sum of

twenty-five thousand dollars in bankable Confederate currency, etc., in addition to give his note, with Wm. P. Farish and Wm. H. Peyton as securities, for the further sum of twenty thousand dollars, to be paid in twelve months after call, in equal annual payments thereafter, or at said Peyton's option it may be, on call, all or a part paid. The said Geo. Rives covenants he will not call on said Peyton for specie when it is at a premium, but engaging on his part to be satisfied with the bankable currency of the day, on the stipulation to choose his own time for the call. The said postponed payment to carry interest from the 1st of January next, and to be annually paid at Monticello Bank. The said Geo. Rives further engages to furnish said Peyton 100 barrels of corn at $20 per barrel, to be delivered on the place as soon as gathered, and the money therefor to be paid down in Confederate bankable currency. In witness whereof, and mutual obligation to perform our respective engagements, we this day, 5th of December, 1863, have signed our hands and seals.

"GEO. RIVES, [SEAL.]
"GEO. L. PEYTON, [SEAL.]"

On the 1st of January, 1864, Geo. L. Peyton, with Wm. H. Peyton and Wm. P. Farish as his sureties, executed to Geo. Rives, not their "*note* for the further sum of $20,000, to be paid in twelve months after call, in equal annual payments, or at said Peyton's option," etc., but *two* separate *bonds*, one for $8,000 and the other for $12,000. The first of these is as follows, viz:

"On demand, or twelve months thereafter, at the option of the obligors, we promise to pay, in the bankable currency of the day (according to agreement of the 5th of December last,) to Geo. Rives, his heirs or assigns, eight thousand dollars, with interest from date, to be annually paid on 1st of January, at Monticello Bank, Charlottesville. The same being in part of the purchase-money for thirty-three negroes, the title whereof is warranted, but no warranty is

made of soundness. The said demand shall be made in writing by said Geo. Rives, his heirs or legal representatives only. In witness whereof we have hereto put our hands and seals this 1st day of January, 1864.

"GEO. L. PEYTON, [SEAL.]
"WM. H. PEYTON, (*Security,*) [SEAL.]
"WM. P. FARISH, (*Security,*) [SEAL.]"

The other bond is precisely similar, except that it is for $12,000, and payable on demand, "or *two* years thereafter, at the option," etc. (See page 5 of record for both bonds.)

The year's interest which fell due 1st of January, 1865, was paid.

Demand upon the obligors for payment was made by Geo. Rives *in writing*, in August, 1866. (See page 40 of record.)

Payment not having been made, and Geo. Rives, the obligee, and Wm. P. Farish, one of the sureties, having both died, Charles Edward Rives, ex'or of the former, (and a citizen of New York,) brought his action of covenant on the bonds against Andrew J. Farish, administrator *d. b. n. c. t. a.*, of Wm. P. Farish, deceased. Charles Edward Rives having died, and his brother, Geo. C. Rives, a citizen of Texas, having qualified in his stead (in Virginia) the suit was revived in his name. (See p. 36.)

The first count in the declaration sets out the *substance* of the agreement and bonds; the second sets them out in full.

At the rule day on which the declaration was filed, the defendant demurred generally to the declaration, and to each count thereof; pleaded *covenants performed* and *covenants not broken*, and the *twenty-five special* pleas, which begin on page 7 and end on page 33 of the record.

At same time the defendant filed a notice in writing, that on the trial of the cause he would insist upon his right "to have the bonds sued upon sealed according to the provisions of chapter 138 of Code of Virginia (edition of 1873), as bonds which were either, according to the true understanding and agreement of the parties, to be fulfilled or performed in Confederate States treasury notes, or were entered into

with reference to such notes as a standard of value." (See p. 34 of record.)

At the same time, plaintiff joined in the demurrer, took issue upon the pleas of *covenants performed* and *covenants not broken*, and demurred to each of the twenty-five *special* pleas. No notice was taken by him of the *notice to scale*, because under the statute, and according to the practice in Virginia, the question raised by it was to be disposed of without the formality of pleading.

At the ensuing term, the court *overruled* the demurrer to the declaration, and to each count (of which, however, no entry was made till the trial term—see page 37), and *sustained* the plaintiff's demurrer to each and all of the defendant's twenty-five special pleas. And, by leave, the defendant filed two additional special pleas, on which issue was joined, (p. 35 of record.)

The first of these pleas alleged that the bonds sued upon and described in the *first* count were not made, executed, or delivered in pursuance of the agreement of the 5th December, 1863, described in the same count, were not agreed upon by all or any of the obligors and George Rives; nor were they given by the former and accepted by the latter, as a compliance with the clause in the agreement aforesaid, in reference to the "note" for the deferred portion of the purchase money for the slaves. And further, that the said slaves were not delivered by George Rives to George L. Peyton in pursuance of the agreement aforesaid, as set forth in said first count. And the second of said pleas was substantially like the first, except that it referred to the agreement, bonds and slaves, mentioned in the *second* count of the declaration.

Thus issue was joined on the pleas of—

Covenants performed;

Covenants not broken;

The two special pleas just mentioned; and

By the *notice to scale*, the question was raised (and this was the real controversy in the case) whether the bonds sued

upon should be *sealed* under the statute of Virginia referred to?

That statute is as follows:

"SECTION 1. In any action or suit, or other proceeding for the enforcement of any contract, express or implied, made or entered into between the first day of January, 1862, and the tenth day of April, 1865, it shall be lawful for either party to show, by parol or other relevant testimony, what was the true understanding and agreement of the parties thereto, either express or to be implied, in respect to the kind of currency in which the same was to be fulfilled or performed, or with reference to which, as a standard of value, it was made or entered into; and in an action at law or suit in equity, it shall not be necessary to plead the agreement specially in order to admit such evidence.

"SEC. 2. Whenever it shall appear that any such contract was, according to the true understanding and agreement of the parties, to be fulfilled or performed in Confederate States treasury notes, or was entered into with reference to such notes as a standard of value, the same shall be liquidated and settled by reducing the nominal amount due or payable under such contract, in Confederate States treasury notes, to its true value, at the time they were respectively made and entered into, or at such other time as may to the court, or if it be a jury case, to the jury, seem right in the particular case; and upon the payment of the value so ascertained, the party bound by such contract shall be for ever discharged of, and from the same; * * * *Provided*, that when the cause of action grows out of a sale, or renting or hiring of property, whether real or personal—if the court—(or where it is a jury case, the jury) think that under all the circumstances the fair value of the property sold, or the fair rent or hire of it, would be the most just measure of recovery in the action, either of these principles may be adopted as the measure of the recovery, instead of the express terms of the contract."

NOTE.—In the act, as printed in the code, this *proviso* is

a part of the *first* section. The court of appeals of Virginia have decided that it belongs to the *second*. (*Pharis* v. *Dice*, 21 Grat. 303.)

Upon the issues formally joined, the jury found for the plaintiff, but sustaining the defence set up by the notice to scale, assessed his damages at $1,000 with interest, etc., "that being the scaled value as of the 1st of January, 1864, of the nominal amount of the bonds sued on, less the one year's interest credited thereon." And judgment accordingly, (p. 37.)

At the trial the plaintiff filed two bills of exceptions: The first to the opinion of the court, overruling plaintiff's objection to evidence offered by the defendant, and allowing the same to be introduced. (Beginning on page 38 and ending on page 42.) And the second to the action of the court, in refusing to give the instructions asked for by the plaintiff; (pp. 49, 50,) and giving the instructions found on pp. 50, 51. This second bill of exceptions begins on page 42, and ends on page 51 of the record.

Assignment of Errors.

We respectfully submit, that the court erred:

First. In allowing the defendant to introduce evidence tending to prove as follows, viz: (pp. 40, 41.)

1. That Confederate currency was the only currency in circulation in Virginia in December, 1863, or January, 1864.

2. That in December, 1863, the value of gold in relation to such currency, was as 20 to 1, and in January, 1864, as 19 to 1.

3. That of the thirty-three slaves sold by Geo. Rives to George L. Peyton, one woman and her two children were scrofulous, and another woman a cripple; and that in December, 1863, and January, 1864, the said thirty-three slaves were not worth in Richmond, Va., in Confederate currency, as much as $45,000; and that they were worth less in Albemarle, where they were sold, than in Richmond.

4. That such a lot of slaves, before the late war, even when the price of slaves was at its highest, would not have been worth more than $8,000 or $9,000.

5. That in December, 1863, and in January, 1864, all Confederate currency in circulation was bankable.

6. That as early as the fall of 1863, there was a general expectation among the people of Virginia that the Confederate congress would adopt some measure to reduce the volume of Confederate currency, and that the value of such money would be thereby much increased.

7. That in point of fact, the Confederate congress, in February, 1864, did pass a law taxing to the extent of 33⅓ per cent. all Confederate currency which should not be invested in 4 per cent. Confederate bonds, on or before the 1st of April, 1864; the effect of which law was to depreciate still further the value of Confederate currency then in circulation, and that after the 1st of April, 1864, the Confederate money issued prior thereto ceased to be bankable.

8. That in December, 1863, and January, 1864, slaves were not being sold at all for gold.

9. That about the same time, Tucker Coles, of Albemarle, living five or six miles from George Rives, owned about 200 slaves, mechanics and field hands, and averaging in value better than the slaves of George Rives; that he tried to sell a large number of them at $50 a head in gold, but could not, and that he would have sold them at $30 a head in gold had it been offered him.

10. That all of the slaves purchased of George Rives by George L. Peyton, perished as property on his hands at the close of the war.

11. That in August, 1866, the premium on gold as compared with national currency was 49 per cent.; in August, 1867, 41 per cent.; and in August, 1868, 45 per cent.; and that at the time of the trial it was only ½ of 1 per cent. The reasons for this exception are thus stated on p. 41 and 42 of record:

First, "Because the contract sued upon is in writing, and

its meaning free from ambiguity, obscurity or uncertainty of any kind, and, cannot, therefore, be explained, added to, or in any manner varied by parol evidence."

Second, "Because the evidence offered does not come within the scope or meaning of the statute of Virginia, (Code of 1873, p. 979–'80,) in reference to Confederate contracts, which was intended to apply only to contracts for the payment of "dollars," in general, and not to those in which the kind of dollars is specifically expressed, or becomes certain by some event or contingency mentioned in the contract."

Third, "Because, if according to the true interpretation of the statute just referred to, it makes parol testimony admissible to explain, add to, or in any manner vary a contract in writing entered into prior to its enactment (in 1866), and which is in no way ambiguous or uncertain; then the statute is a violation of the Federal Constitution. And so far as said statute authorizes courts and juries to adjust contracts for the sale of property, by reference to the value of the property sold, and not to the price agreed, not only impairs, but destroys the obligation of the contract, making a new one in its stead, and is a plain violation of the Constitution aforesaid."*

Second Assignment of Error.—We submit that the court erred in refusing to give the instructions asked for by the plaintiff as follows, viz: (pp. 349–50.)

"If the jury find from the evidence that the contract in writing between Geo. Rives and Geo. L. Peyton, dated the 5th of December, 1863, and given in evidence by the plaintiff, is the contract referred to in the bonds sued upon, then the court instructs the jury that said contract and bonds are to be construed together, and that so construed, they import in themselves, not a contract to be paid absolutely in Confederate money, or any other specific currency, but a contract of hazard—that is to say, a contract payable in whatever currency should be bankable at the respective dates when the obligors were bound to pay said bonds—

* For "Fourth" reason, omitted by accident here, see page 25.

that is to say, on the 30th of August, 1867, as to the smaller bond, and on the 30th of August, 1868, as to the larger bond.

"2. If the jury find that the contract of the 5th of December, 1863, and the bonds of the 1st of January 1864, given in evidence by the plaintiff, contain the true understanding and agreement of the parties as to the currency in which said bonds were to be paid; that more than two years before the institution of this suit, Geo. Rives demanded payment of said bonds of each of the obligors, and in the mode agreed upon; that at the time of said demand and ever since, bankable currency in Charlottesville and throughout Virginia consisted wholly of national bank notes and greenback notes of the United States Government, and that these have always been of equal value in their relation to gold; then the jury must find for the plaintiff the face amount of the bonds, less the one year's interest credited thereon.

"3. That there is no evidence in the cause to warrant the jury in finding that there was any other agreement or understanding between the parties as to the kind of currency in which the bonds were to be paid, than that which is contained in the written contract and bonds themselves."

Third Assignment of Error.—And we respectfully insist, also, that the following portions of the charge of the court to the jury, (p. 50,) are erroneous, viz: the *last* clause of the first paragraph, in the following words:

"Unless the jury find from the evidence in the cause that the said writings obligatory were at the time made and understood by the parties thereto to be made payable in Confederate money." And the *first* clause of second paragraph, in these words, viz:

"And if the jury find from the evidence that the said bonds or writings obligatory were made in reference to Confederate currency, then the plaintiff is entitled to recover the amount stipulated to be paid in such bonds at the value of Confederate money, compared with national currency, at

the time of the making thereof, with interest from the time said bonds, according to their tenor and effect, became payable."

The grounds of exception upon the 2d and 3d assignments are thus on p. 51 of record:

"The ground of this exception being that the terms of the bonds sued upon taken in connection with the contract of December 5, 1863, to which they refer, are wholly free from ambiguity, and plainly import, not a contract payable absolutely in Confederate currency, or any other currency, but a contract of hazard, payable in the currency, whatever it might chance to be, which should be bankable, on the days on which the bonds respectively should become payable, according to their tenor and effect; and there was no proper or sufficient evidence tending to show that there was any other contract between the parties, and, therefore, none to sustain the theory on which the instruction is predicated."

Argument.

That the evidence excepted to had no relevancy to either of the four issues formally joined, is plain. It was offered to induce the jury to sustain the defence involved in the *notice to scale.*

Some of it had reference to the *value* of the slaves sold, (paragraphs 3 and 4). And though on that account, if the contract had been shown to be payable in Confederate money, it would have been admissible in Virginia, as showing the proper measure of recovery, (*Pharis* v. *Dice*, 21 Grat. 303,) yet even that decision is overruled by the decision of this court in *W. & W. R. R. Co.* v. *King, Ex'or*, 91 U. S., 3.

The issue *practically* joined under the notice to scale, was upon the defendant's allegation, that the bonds sued upon were, *according to the true understanding and agreement of the parties, to be fulfilled or performed in Confederate States treasury notes, or were entered into with reference to such notes as a standard of value.*

The latter branch of this allegation is not different from

the first; it is only a different form of asserting that, according to the agreement and understanding of the parties, the contract was to be fulfilled in Confederate currency. If the legislature intended to say *that parties could not fix the price of property at its Confederate money value, and then buy and sell it at that price, either under a contract of hazard or a contract to pay that price* ABSOLUTELY *in good money;* but that *such* a contract *must be scaled;* then *quoad hoc*, the statute would have been a palpable violation of the Federal Constitution, since it would not only have "impaired," but *destroyed* the obligation of a contract, in no wise illegal or against public policy, but only unwise and inexpedient on the part of the buyer.

So that the enquiry is narrowed down to this: Was the evidence admissible to show that, according to the agreement and understanding of the parties, the *deferred* payment of the purchase money for the slaves, viz: $20,000, with interest, was to be paid in Confederate currency?

And on this point we say:

First.—The evidence was not admissible at common law, because the *written* contract between the parties is *wholly free from ambiguity.*

That in ascertaining the true meaning of the bonds sued on, they are to be taken in connection with the agreement of the 5th of December, 1863, is plain. On their face they refer to an agreement of that date.

Defendant introduced no evidence to sustain pleas Nos. 28 and 29. The only pretext for them is that the agreement stipulated for a "note" for $20,000, whereas, when the contract came to be closed, *two bonds*, for $8,000 and $12,000, respectively, were substituted for a note. This would not have sustained the pleas referred to even in the absence of plaintiff's proof—that George Rives never made but *one* sale of slaves to George L. Peyton; so that the agreement referred to in the bonds could not by possibility have been any other than that which plaintiff gave in evidence; and the jury so found.

Construed together, then, the writings *plainly* import not

a contract payable *absolutely* in Confederate or in any other currency, but a *contract of hazard*—that is to say, a contract payable in such currency as should chance to be the "bankable currency of the day," on which Rives should demand payment, if the obligors preferred to pay then, or in such currency as might be the "bankable currency," one year after demand as to the first bond, and two years thereafter as to the second bond, should the obligors avail themselves of the "option" which was accorded them.

That the writings do not import a contract payable in Confederate money, is shown by the following considerations, viz:

1. As to so much of the purchase-money as was *intended* to be paid in Confederate currency, viz., $25,000, the contract is *explicit* that it shall be so paid, and paid in *bankable* Confederate currency.

2. By the same contract Rives sold to Peyton 100 *barrels* corn for $2,000, which it is expressly stipulated is to be paid down in "Confederate *bankable* currency," and was so paid.

3. And yet as to the deferred payment of $20,000 it is *not* said that payment shall be made in Confederate currency. Why this silence?

4. The covenant on the part of Rives that he "will not call for *specie* when it is at a premium," is absolutely inconsistent with the idea that there was any agreement or understanding that Peyton should have the right to pay in Confederate currency. Such covenant is simply nonsense, and wholly unintelligible, if there was any such agreement or understanding.

5. But the covenant plainly implies Rives' *right to call for specie* when not at a premium; than which, nothing could more absolutely exclude all idea of *Peyton's right* to pay in Confederate currency.

And affirmatively: That the writings *plainly* and *beyond all question* import a *contract of hazard*, as heretofore defined, is equally obvious from the following considerations, viz:

1. Although it is manifest that the writings were drawn with great care, and with a studied effort to express the whole contract of the parties, no specific medium of payment is mentioned.

2. Under the contract the obligors *have no right to pay until payment is demanded by Rives.*

3. It expressly secures to Rives the right "to choose his own time for the call."

4. And then, that there may be no cavil about this right, and none as to whether it had been exercised or not, it is explicitly provided in both bonds that "the said demand shall be made *in writing* by said Geo. Rives, his assigns or legal representatives *only*;" ~~and~~

5. And finally: The bonds are payable in the "bankable currency of the day." And whilst neither the contract nor the bonds state *expressly what day* is intended, the stipulations in both of them, and the obvious design of such stipulations, make it just as certain *as if it had been so expressed*, that payment was to be made in the "bankable currency of the day" on which payment should be demanded; OR of the day "one year" after demand as to the first bond; and the day "two years" thereafter as to the second, at the option of the obligors.

We admit that the words, "on demand," "when called for," and the like, when used in a bond, *with nothing therein to give them a different meaning*, make the instrument payable at the will of the obligor, though no demand be made by the obligee. The question has frequently been before the court of appeals of Virginia, on bonds executed during the war. And whenever there was nothing to qualify the words "on demand," or like terms, that court has held the bond to be payable at the will of the obligee; and that *because it was made so payable at a time when it was not possible that payment should be made except in Confederate money, there being none other*, the parties should be considered as having intended payment in such money. *Miller & Franklin* v. *The City of Lynchburg*, 20 Grat. 330; *Stover* v. *Hamilton*, 21 Grat.

273; *Omohundro* v. *Omohundro*, Ib. 626; *Bowman* v. *McChesney*, 22 Grat. 609; *McClung's Adm'r* v. *Irving*, Ib. 519.

But in the first four of these cases the court expressly declares that they are to be distinguished from the earlier case of *Boulware* v. *Newton*, and are to no extent in conflict therewith. And though, in the fifth named case, no reference is made to *Boulware* v. *Newton*, it is plain there was no purpose to overrule or to impair the authority of that case; for *McClung* v. *Irving and Bowman* v. *McChesney* were decided at the same term of the court.

In *Boulware* v. *Newton*, 18 Grat. 708, the bond was made payable "on demand, three months after notice to pay," &c. Had this been all, the court would doubtless have held the bond, which was dated in January, 1863, as payable *in presenti*, and, therefore, to be scaled for the reason assigned above. But the bond further provided that "the said Boulware shall not be required to receive the money except at his pleasure." This made it a contract of hazard; and though given for the loan of Confederate money, greatly depreciated, the court held that it was payable, *dollar for dollar*, in the currency of the day when the payment was demanded. And this case has never been impugned in Virginia. See also *Gavinzel* v. *Crump*, 22 Wall. 308.

It is true that *the writings* between Rives and Peyton do not contain the precise form of expression, "the said *Rives* shall not be required to receive the money except at his pleasure;" but it is submitted, that *in effect*, they secure this right to Rives *as plainly* as if the words quoted had been employed. This is done: 1, By the stipulation that Rives "shall choose his own time for the call;" 2, By the stipulation that "he will not call on said Peyton for specie when it is at a premium;" and 3, By the provision in the bonds that "the said demand shall be made in writing by said Geo. Rives, his assigns or legal representatives only." That is to say, the obligors shall have no voice in fixing the

time when Rives must demand or receive the money. This provision is only intelligible *as intending to exclude the obligors from this right.* It was not inserted for the benefit of the obligees. It secures them no benefit beyond the right to disregard a *verbal* demand for payment. *They* had no interest in the restriction of the right of demand to the said Rives, his assigns or legal representatives only. As to them this was no restriction at all. There was no one who could possibly require the obligors to pay, *except* Rives, his assigns or representatives. But without the provision referred to, there would have been no *express* exclusion of *their* right to demand that Rives receive the money, (however clearly such right is *impliedly* excluded without it,) and it was to effect this express exclusion that the restriction was inserted. It is the counterpart, so to speak, of what is said in the agreement,—That says Rives shall choose his own time for the payment. The bonds say no one else shall fix it.

The plaintiff below, then, having, by his *written* evidence, established a contract of hazard, wholly free upon its face from doubt, obscurity, or ambiguity, as to its meaning, it was certainly not competent by common law for the defendant to attempt by *parol* evidence to show a different contract.

But the statute of Virginia, which has been given in full, is invoked by defendant to justify this attempt. And we admit that this statute is very broad. It applies in terms to *all* proceedings to enforce any contract, express or implied, made between the 1st January, 1862, and the 10th April, 1865.

But did the legislature *intend*, even by this broad language, that in a suit upon a *written* contract, *free from ambiguity*, the defendant might resort to PAROL testimony to set up a *different contract?* Ought not the statute rather to be interpreted with reference to the evil or mischief which it was designed to remedy, and to be restricted in its operation to the prevention of that mischief?

What the mischief was, is not doubtful. And it is clearly set forth by CHASE, Chief-Justice, in *Thorington* v. *Smith*,

8 Wall. 1, to which we respectfully refer the court. See also *Confederate Note Case*, 19 Wall. 548. It existed *only* in respect to contracts in which the word "dollars" was used *generally*,—at a time and under circumstances in which the word had different meanings,—and there was nothing in the contract itself to show *what kind of dollars the parties meant*. *This* was the evil which the statute was designed to remedy, and we submit that it ought not to be so construed as to allow of parol evidence in any other case. This was the view of CHRISTIAN, J., in *Hilb* v. *Peyton*, 21 Grat. 386. He says, "Now, by the very terms of this section, the parol evidence to be admitted under it is confined and limited to the *kind of currency* in which the obligation is to be fulfilled or performed. Where the parties themselves have stipulated in writing as to the kind of currency, * * then this section clearly does not apply," &c. This opinion was concurred in, at the time, by a majority of the court. But the case was subsequently reheard—22 Grat. 550—when STAPLES, J., changed his opinion, and the court, by a bare majority, held that the statute extends even to contracts in which *the kind of currency is specified ! !*

But it is not asking too much, especially in view of the history of *Hilb* v. *Peyton*, respectfully to ask this court *to review* the decision of the supreme court of Virginia, even as to the *construction* of the statute. It seems hardly possible to conceive that the legislature *intended* (as Judge Staples says it did) "to apply the statute to an instrument of writing in which the *kind of currency is specified*," or otherwise made certain by its terms, and to authorize the obligor, by parol evidence, "to contradict the positive language—the express terms—of his obligation." (22 Grat. 562.)

And if this court shall concur with the Virginia court as to the *meaning* of the statute, then the further question is presented, which *must* be decided here—whether the statute *thus* interpreted does not sadly impair, not only the *value*, but the *obligation* of contracts, and is, therefore, within the

prohibition of the Constitution of the United States, Article 1, section 10, clause 1.

As the law was when the contract between Rives and Farish was entered into, the *writings* between them, being free from ambiguity, were *conclusive* as to *what their contract* was. Parol evidence was admissible to prove the legal or *mental incapacity* of the obligors to execute it; that it was *procured by fraud;* that it had been *discharged* by payment, or by the *substitution* of another agreement in its place; *but not to prove that no such contract was ever entered into; or that it was entered into subject to an agreement or understanding that it was to be discharged in a medium different from that plainly expressed therein.*

In *Planters Bank* v. *Sharp, &c.*, 6 Howard, 327, it was said: "One of the tests that a contract has been impaired is, that its value has, by legislation, been diminished. It is not, by the constitution, to be impaired at all. This is not a question of degree or cause, but of encroaching, in any respect, on its obligation, dispensing with any part of its force."

And though this doctrine is said, in *Von Hoffman* v. *City of Quincy*, 4 Wall. 535 (553), to have "reference to legislation which affects the contract directly, and not incidentally, or only by consequence;" yet it is insisted that the Virginia statute is of the former character. The moment it was passed the contract sued on in this case *ceased to be what it was before—conclusive* evidence between the parties of the terms of their agreement. The statute made it *prima facie* evidence only. Can it be said that an obligation, whose character has been reduced from "conclusive" to "*prima facie*" only, has not been impaired?

In the same case, *Von Hoffman* v. *City of Quincy*, (p. 553,) it is said: "It is competent for the States to change the form of the remedy, or to modify it otherwise as they may see fit, *provided no substantial right secured by the contract is thereby impaired.*" When the contract sued on was entered into, it was the *right* of Rives, that the *writings* signed by the obligors should be held, in any controversy which

might grow out of them, *conclusive* evidence of the kind of currency—(*i. e.*, "the bankable currency of the day")—in which the agreement was to be fulfilled. This surely was a *substantial* right; and how far it was *impaired* by the act may be inferred by the verdict of the jury in this case; and the many similar verdicts and judgments in Virginia which have resulted from said act.

Third, But if this court shall be of opinion, not only that the legislature of Virginia *intended* by its act to allow the *plain* meaning of a *written* contract to be contradicted and set aside, and an entirely different contract to be substituted in its place by parol evidence, but also that such act is no violation of the Federal Constitution, we still maintain that the evidence excepted to was not admissible, because *not relevant* to the issue raised by the notice to scale; and it is only "*relevant*" testimony that the statute allows.

The first rule governing the production of evidence is, that it must "correspond with the allegations, and be confined to the point in issue. 1 Greenl. on Ev. sec. 51, (ed. 1857). In other words, the evidence must be *relevant*.

It is conceded that it need not bear *directly* upon the issue. It is enough if it *tends* to prove the issue, or constitutes a *link* in the chain of proof.

But "the rule excludes all evidence of *collateral* facts, or those which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute." 1 Greenl. Ev. sec. 51, 52; *United States* v. *Gilmore*, 7 Wall. 494-5.

The issue under the notice to scale was upon the allegation of the defendant that the bonds sued upon "were, according to the true understanding and agreement of the parties, to be fulfilled or performed in Confederate States treasury notes."

The first evidence offered by the defendants (and this we take as a specimen of the whole,) was intended to prove

"that Confederate currency was the only currency in circulation in Virginia in December, 1863, or January, 1864," (the dates of the agreement and bonds respectively.)

Now, as the contract in writing was, as plainly as language could make it, a contract to pay *in the bankable currency of the day on which Rives should make his demand*, (which day he had the right to postpone until that currency should be equal to gold), or, of the alternative periods mentioned in the bonds, at the option of the obligors; what tendency was there in the evidence just referred to to prove *that the writings did not contain the true agreement of the parties*, but *that their true agreement contemplated payment in Confederate currency?* Does the fact that Confederate money was the only bankable currency in Virginia at the date of the contract raise the presumption, or afford any ground for the inference, *in the face of the plain meaning of the written contract*, that the parties *intended* payment to be made, not as expressed in the contract, but in Confederate currency?

It is submitted that so far from having any such tendency, its legitimate tendency (especially in connection with the second fact offered to be proved, viz: the great depreciation of Confederate currency in December, 1863, and January, 1864,) was to show the wisdom of the vendor in selling upon the terms so plainly expressed in the writings. And thus the two facts—that *Confederate* was the only currency, and that that was almost worthless—really tend to prove that the vendor did *not* agree to receive Confederate money, and *fully to explain why he did not.*

It is conceded that much of the evidence offered tended to show that in buying upon a contract of hazard, Peyton's bargain was an *injudicious* one, and that its enforcement, according to the plain meaning of the writings, as events have turned out, would operate on him *very hardly.* Of this character was the evidence tending to show the *unsoundness* of some of the slaves: that they were not worth $45,000, *all* in Confederate money, even in Richmond; that they were worth still less in Albemarle; that before the war, when

they were at the highest price, they would not have been worth more than $8,000 or $10,000; that the slaves perished, as property, on Peyton's hands; and perhaps other portions of the evidence.

But it is submitted that no amount of evidence of this sort can have any appreciable tendency to produce the conviction that even the obligors, unwise as the contract may have been, and unfortunate as the results of the war made it, entered into it with any other understanding or agreement than such as the writings plainly import. And if this were not so—if the evidence referred to tended to lay the foundation for any contrary reasonable inference *as to the obligors*—that would not be enough. Such inferences must be as to the *aggregatio mentium;* that the alleged understanding and agreement was *mutual.* And it is difficult, nay, impossible, to conceive how facts, which, for the very reason that they tend to show that the vendee made a *bad* bargain, equally show that the vendor made a *good* one, should be held to have any tendency to prove that the vendor entered into that bargain with the understanding and agreement that *all its advantages were to be waived*, and an entirely different one substituted for it!

Let it not be forgotten, that there is no dispute as to the fact *that a written contract was entered into, and that the agreement and bonds given in evidence constitute that contract.* And the question is, whether the evidence offered tended to show that *that contract in writing* was entered into with the agreement and understanding that it was to be fulfilled in Confederate currency?

There can be no better test of the absolute *irrelevancy* of facts or evidence to a particular issue than that, however multiplied or accumulated such facts or evidence may be, they can afford no *reasonable or sufficient* ground for the desired inference or conclusion which is sought to be established. For if, in such case, the aggregate be *insufficient*, it must be because the parts are all wanting in *tendency* to prove that inference or conclusion. It is readily conceded

that evidence *similar* to that in question, and show ing additional facts similar to and stronger than those which were proved, might be accumulated to an extent that would establish *incapacity to contract* on the one side, or fraud on the other. But no such degree has been reached in this case, and if it *had* been, there is no plea to which such evidence would be applicable; and it would certainly not prove nor tend to prove the defence relied on under the notice to scale.

It is easy to conceive of evidence which *would tend* to sustain that defence. We can conceive it to be *possible*, however improbable, that at the very moment of signing the writings the parties should have agreed, and so stated, that those writings were not to control them; that to suit their own purposes they had chosen to put their *written* contract in *one* form, but their *real* contract in *another*, viz: in an oral agreement or understanding that the dollars contracted for were to be paid in Confederate currency.

Now, clear and decided evidence to this effect, if *allowed* and *properly* allowed by the statute, would require the jury to *scale* the contract, and would not need to be supplemented by such evidence as was offered and excepted to in this case. But if the evidence as to whether there was such an *expressed* cotemporaneous understanding and agreement, as has been referred to, should be in itself conflicting, then perhaps it might be admissible to prove *some* of the facts which the defendant offered to prove, viz: That Confederate currency was the only currency of the day; and that the negroes were worth less in any currency than the contract called for. In the supposed conflict of testimony upon the point as to the cotemporaneous parol agreement or understanding, the facts referred to might be useful in enabling the jury to arrive at the truth; and so, would probably be admissible, as tending to establish facts from which it might be reasonably inferred that the evidence which *tended* to show the *express* cotemporaneous agreement or understand-

ing, at variance with the written agreement, should be credited rather than that of the contrary tendency.

In this case, however, there was not a scintilla of evidence tending to show any *express* agreement at variance with the terms of the written contract. The evidence excepted to was, therefore, not offered as a help to the jury in passing upon conflicting testimony touching such an agreement; and hence, it constituted no *link* in any *chain* of facts or evidence tending to sustain the defence. *It is simply an attempt, at one bound, to infer the utter worthlessness of plain written evidence, from a series of collateral facts; each, and all of which may exist in perfect harmony with the entire contract which that written evidence discloses.*

We come now to the second assignment of error; and, indeed, much of what may be said under this head will apply also to the third error complained of.

The first instruction refused, asked the court *to construe* the *written* contract between the parties, (pp. 49, 50). That the *right* to do this belonged to the court, and not to the jury, is a proposition which need not be fortified by authority. And that the interpretation which this instruction gives to the written contract is the true one, has been shown, we respectfully submit, in discussing the first assignment, and, indeed, is plain on the face of the contract itself. The nature of the defence set up—a defence resting upon parol evidence, introduced to avoid the force of a written contract, *and appealing so strongly to the prejudices and sympathies of the jury*—made it pre-eminently proper and necessary for the more certain attainment of justice, that the jury should be *judicially* informed as to what was the written contract between the parties. Such information, upon the theory that the parol evidence was admissible, was indispensable to enable them to determine how far that evidence varied the written contract, and thus to ascertain the *whole* contract between the parties.

The second instruction asked for by the plaintiff, and de-

nied by the court, was not based upon the written contract alone, but left all the evidence in the cause to the jury, and was designed, should the jury sustain the written contract, to guard against a verdict based on the *scaled* value of the currency bankable when the bonds became payable, as compared with gold, instead of the whole amounts called for by the bonds, to which latter amounts plaintiff was entitled, according to *Gavinzel* v. *Crump*, 22 Wall. 308.

The third instruction asked for by plaintiff, and refused, assumes that there was no evidence to warrant the jury in departing from the terms of the written contract. And this is equally the ground of the *third* error complained of, as already set out.

The issues in the cause have already been stated. Practically there was but one. The defendant's *notice to scale* was a substitute for, and the equivalent of, a plea on his part, in confession and avoidance, and the evidence he was allowed to introduce under it was intended to rebut the *prima facie* case made by the plaintiff's evidence. The burden was, therefore, on the defendant to sustain the affirmative of the issue thus made, and the rules governing the Federal courts, touching instructions upon evidence, apply to him just as fully as though he were plaintiff in the cause.

If the ground taken under the first assignment of error, viz: that the whole of the evidence excepted to was *inadmissible*, was well taken, that disposes of *most* of the evidence which was actually introduced by the defendant, (see his evidence from page 45 to page 49,) as a basis either for the court's instructions or the verdict of the jury thereunder. And as to those parts of defendant's evidence, which were not specifically excepted to, (if indeed there be any such,) they are certainly of the same collateral and *wholly irrelevant* character with that expressly covered by the exception.

And we respectfully submit that in all the evidence there is *nothing* which even *tends* to rebut the intent of the contracting parties as exhibited in their written contract. There

was, therefore, no necessity for submitting to the jury the question whether there was an understanding between the parties different from their written contract, and none for instructing them as to the measure of damages, should they find there *was* such an understanding. To do either "was an invitation to find a fact of which there was no evidence." *Dows et al* v. *National Exchange Bank*, 91 U. S. Rep. 618–634.

But if the evidence in the cause had all been legal, and *none* of it excepted to, still the plaintiff's third instruction was *right*, and the court's charge so far as excepted to was (with deference) *wrong*, because that evidence was not *sufficient* to justify the jury in finding *any* agreement or understanding in conflict with the written contract. Judges are not required to submit a question to the jury "merely because *some* evidence has been introduced by the party having the burthen of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party," etc. *Improvement Company* v. *Munson*, 14 Wall. 442–448.

This court will hardly hold that, upon a demurrer to the defendant's evidence, it would and ought to have been held sufficient to prove a contract different from that in writing. And the plaintiff's third instruction, and his exception to the court's charge, were each equivalent to such demurrer. *Parks* v. *Ross*, 11 Howard, 362, 373; *Pleasants* v. *Fant*, 22 Wall. 116.

It was "clear," that upon the evidence in this cause, the defendant's defence under the Virginia scaling act, ought not to have been sustained. Hence, the instruction asked for by plaintiff ought to have been given; and the charge of the court ought *not* to have been given. *Merchants Bank* v. *State Bank*, 10 Wall. 637.

A case ought not to be submitted to the jury merely because the evidence raised a "*suspicion*" that the *prima facie* case of the other party might be true. *Ward* v. *U. States*, 14 Wall. 28. And we respectfully submit, that the whole

of defendant's evidence in this case does not raise even the *faintest suspicion* that the agreement and bonds do not contain the true and only agreement between the parties.

Courts are no longer required to submit a case to the jury merely because the party holding the affirmative has introduced *some* evidence. It must be of a character *to warrant* a verdict in favor of the party who introduces it. *Commissioners* v. *Clark*, 94 U. S. Rep. 278, 284.

Respectfully submitted,

WM. W. CRUMP,
E. R. WATSON,
Counsel for Appellant.

October 20, 1881.

Omitted on page 8:

Fourth, Because in no case does the said statute of Virginia, even if constitutional as to any part of it, in its application to contracts made before its passage, which is denied, admit any other than relevant testimony, and that which is now excepted to has no relevancy whatever to any issue or question involved in the cause; since if every fact which it legitimately tends to prove, were admitted they would show no defense to the plaintiff's case.

JAN 28 1882

SUPREME COURT OF THE UNITED STATES.

No. 156.

GEORGE RIVES' ADMINISTRATOR, &c.,

vs.

WM. P. FARISH'S ADMINISTRATOR, &c.

BRIEF OF COUNSEL FOR DEFENDANT IN ERROR.

SUPREME COURT OF THE UNITED STATES.

No. 156.

GEORGE RIVES' ADMINISTRATOR, &c.,

vs.

WM. P. FARISH'S ADMINISTRATOR, &c.

BRIEF OF COUNSEL FOR DEFENDANT IN ERROR.

I. The plaintiff in error has no ground to complain of the verdict and judgment, for by them he gets $1000, and interest from 1st January 1865, more than he is entitled to.

1. This is so because the 33 slaves sold by Rives to Peyton, for a part of the price of which the bonds sued upon were given, were covered by President Lincoln's Proclamation of Emancipation, and hence were free at the time of the pretended sale. No consideration passed; and, besides, the sale being contrary to the policy and laws of the United States Government was illegal and void. And, again, Rives' warranty of title was broken.

2. This is so because Rives accepted a special pardon from President Johnson on condition that he would "abide by and faithfully support all laws and proclamations * * * made during the existing rebellion with reference to Emancipation of slaves," by which he is estopped from claiming the proceeds of the bonds in suit, they having been given in violation of the provisions of President Lincoln's Emancipation Proclamation.

3. This is so because the facts stated in defendant's 27th plea, page 33 of the record, are admitted to be true by the plaintiff, he having demurred to the plea, and not taken issue thereupon. The defendant in this plea avers that the said George Rives did "warrant the title to said thirty-three

negroes as slaves against the claims and demands of all persons whatever, and especially against all claims to freedom which said persons, or any of them, sold as slaves as aforesaid by said George Rives to said George L. Peyton, might at any time thereafter set up or assent under or by virtue of any order or proclamation of the President of the United States, and under or by virtue of any authority or power of the United States or any officer thereof."

And the defendant in error in his same 27th plea further avers that "in the year 1865 the said slaves, and every one of them, under and by virtue of the proclamations of the President of the United States, and under and by virtue of the laws of the United States did set up and assert and did successfully maintain all the rights and privileges of free persons, and were and continued to be free persons, and not slaves; so the warranty of title in this plea hereinbefore set out was broken, and the said Geo. L. Peyton and his securities sustained damages to the full amount of the writings obligatory, which damages the said defendant now offers to set off &c."

The plaintiff, as stated, did not take issue upon this plea, but demurred to the same, see page 35 of the record, thus admitting the averments of the plea to be *true*, and, certainly, taking them as true, which they must be according to the record, there should have been a judgment *out and out* for the defendant, so that by the result of the case the plaintiff in error gets $1000, and interest from January, 1865, more than he was entitled to. The error of the Court below in sustaining the demurrer to this plea was one of which the defendant could not avail himself by suing out a writ of error, the amount for which judgment was rendered against him being below the jurisdiction of this Court. But this fact, so far from affording a reason why the judgment should be reversed in favor of the plaintiff in error, should lead to its affirmance, even if the Court should be of opinion that, in other matters, errors exist to the prejudice of the plaintiff in

error, it appearing from the whole record that the plaintiff in error was not entitled to recover any thing.

II. The bonds sued upon were, "at the option of the obligors," bonds "on demand" (page 39 of the record). And the Virginia Court of Appeals, without dissent, declared in Moon vs. Richardson, 24 Grattan 221, that "it has been plainly settled by recent and repeated decisions of this Court, and is no longer open for discussion, that a bond payable 'on demand' is payable presently without demand." And as these bonds were payable "in the bankable currency of the day," and as Confederate currency was bankable on the 1st of January 1864, see pages 41 and 46 of the record, therefore, these bonds, dated and payable the 1st of January 1864, were payable in Confederate currency, worth in January 1864 one in twenty (page 46 of the record.) Hence the jury scaled the aggregate of the two bonds ($20,000) down to $1000, and gave their verdict accordingly.

So, treating the bonds as valid, this result is properly reached without parol evidence.

These bonds contained no restrictions upon the right of the obligors to make *immediate* payment unless imposed by *themselves*, for the bonds are payable on "demand," or one or two years thereafter, "at the *option* of the *obligors*." Certainly, the requirement that the "demand shall be made in writing" imposes no restriction upon the right of the obligors to make immediate payment. It certainly does not do so in terms, nor does it do so by implication. Judge Staples, in delivering the opinion of an undivided court in Omohundro's Ex'or, vs. Omohundro, 21 Gratt. p. 361, says, "This right (meaning the debtor's right, immediately upon the execution of the bond, of discharging the debt with Confederate treasury notes) it seems to me, necessarily results from the stipulation for the payment of the debt 'on demand.' These words have a plain, distinct, clearly-defined, legal and popular signification, well known to the courts and to the people. When an obligation for money

the jury and court reached, namely, that the bonds, if valid, are payable in Confederate money, and liable to be scaled at the rate of 20 for 1. This conclusion is strongly fortified by the following cases decided by our Virginia Court of Appeals, to which we ask the court's *special* attention, viz: Stover, &c., v. Hamilton, 21 Grattan, 273; McClung's Administrator v. Ervin, 22 Grattan, 519, and Bowman v. McChesney, 22 Grattan, 609, and cases already cited.

III. We insist that the result already reached is correct, but, if there be a doubt about it, it is certainly removed by the parol evidence in this case. The plaintiff in error feeling conscious of this has struggled hard to exclude the parol testimony. But it is clearly admissible under the Virginia Adjustment Act, or Act of March 3d, 1866—see Va. Acts of Assembly 1865–6, p. 184, as amended 28th Feb. 1867. See Va. Acts of 1866–7, p. 694. The first section of that Act provides "that in any action, or suit, or other proceeding, for the enforcement of any contract, express or implied, made or entered into between the 1st day of January, 1862, and the 10th day of April, 1865, it shall be lawful for either party to show, by parol or other relevant testimony, what was the true understanding and agreement of the parties thereto, either express or to be implied, in respect to the kind of currency in which the same was to be fulfilled or performed, or with reference to which as a standard of value it was made or entered into—and in an action at law or suit in equity it shall not be necessary to plead the agreement specially in order to admit such evidence."

And the Virginia Court of Appeals decided in Hilb, for, &c., v. Peyton, &c., 22 Grattan, page 550, that "sec. 1 of the Act of March 3, 1866, known as the Adjustment Act, Sess. Acts 1865–6, p. 184, applies to all contracts made between the 1st of January, 1862, and the 10th of April, 1865; though the written contract on its face specifies the medium in which it is to be paid."

And the Virginia Court of Appeals, by its decision in Calbreath v. Va. Porcelain and Earthenware Co., 22 Grat-

tan, page 697, construed the Virginia statute in the same way. And this construction has ever since prevailed in the Va. Court of Appeals, and the Virginia courts generally. And it is the well settled rule of this court (U. S. Supreme Court) to follow the construction placed by the State court of highest resort upon a statute of its State—this court holding in Leffingwell v. Warren, 2 Black 599, that "the construction given to a State statute by the highest judicial tribunal of such State is regarded as a part of the statute, and is as binding on the courts of the United States as the text." See also to the same effect Providence Institution v. Massachusetts, 6 Wallace, p. 630 ; Hamilton County v. Massachusetts, 6 Wallace, p. 141 ; City of Richmond v. Smith, 15 Wallace, p. 438 ; Supervisors v. United States, 18 Wallace, pp. 81–2.

Hence parol testimony was clearly admissible, the bonds sued upon having been made in January, 1864, and by it the 33 slaves in question are proved to have been worth "in Confederate money, in Richmond, Va., in Dec'r, 1863 and January, 1864," from $35,000 to $40,000, which was "about $2000 higher than the prices then prevailing for the same slaves in Albemarle, Va., where George Rives and Geo. L. Peyton entered into their contract." (See p. 45 of the record.)

For these slaves Peyton agreed to give Rives $45,000, $25,000 cash and $20,000 in his note with Wm. P. Farish and Wm. H. Peyton "as securities." Now, as Peyton agreed to give some $10,000 more than the slaves were worth in Confederate money, it is *impossible* to believe that $20,000 thereof was to be paid in a "sound currency" after the close of the war—which $20,000 alone would have been between two and three times the ante-war value of these slaves ($8,000 or $9,000) when "at its highest." See page 41 of the record. None but an idiot, or alunatic,could have made such a contract ; and even if made by Peyton, it would never have been adopted by his "securities ;" and

even if the "agreement of 5th Dec'r" (which, bear in mind, is between Rives and Peyton only) has any squinting at a contract of hazard, then (to use the language of Anderson, judge, in Hilb v. Peyton, 22 Grattan, 557) the hazard in view of the price agreed to be paid by Peyton, (45,000) must have been "with regard to the appreciation or depreciation of Confederate currency,"—and it seems by the evidence (page 41 of the record) that a better Confederate currency was then generally looked for "among the people of Virginia," and see p. 46 of the record.

Rives and Peyton, when they made their contract, were citizens of the Confederate States—their agreement of the 5th of December, 1863, (to use the language employed by Judge Anderson in Calbreath vs. Virginia Porcelain Co.) "contains not a word or syllable repugnant to the natural presumption, that they meant the currency of their own government; and did not mean the currency of an alien enemy—a circulation which was inhibited by penal statute," (see Calbreath vs. Virginia Porcelain and Earthenware Co., 22 Grattan, pages 701, '2, '3, and see especially what is said on page 702 about the Virginia Act of 14th of October, 1863).

Independently of the Virginia Statute and the Virginia Decisions, construing the same, parol evidence would have been admissible in this case at common law. Greenleaf, 2 Vol., p. 354, sec. 277, (5th Ed.) says, "It is to be observed that the rule is directed only against the admission of any other evidence of the *language* employed by the parties in making the contract than that which is furnished by the writing itself. The writing, it is true, may be read by the light of surrounding circumstances, in order more perfectly to understand the intent and meaning of the parties; but, as they have constituted the writing to be the only outward and visible expression of their meaning, *no other words* are to be added to it, nor substituted in its stead." In accordance with this common law rule parol

evidence was admitted in Thorington vs. Smith; 8 Wal., p. 1, to show the kind of "dollars" referred to in the contract sued upon.

And, in this connection, we would call the court's attention to the fact (page 41 of the record) that about the time of the sale by Rives to Peyton, Tucker Coles, of Albemarle, living five or six miles from George Rives, tried to sell a large number of his slaves, averaging in value better than the slaves of George Rives, at $50 a head in gold, "but could not, and that he would have sold them at $30 a head in gold had it been offered to him." Now Peyton buys thirty-three slaves, inferior to Coles', at $45,000—pays $25,000 cash, and gives bonds for $20,000. Exclusive of the cash, the slaves bring about $600 each, covered by the bonds of $20,000. Can it be *possible* that Peyton agreed to pay, besides the $25,000, $600 a piece in good money for these slaves, when he could have bought from a neighbor of Rives', and one of his own countymen, better slaves for $30 each in gold? Remember that $600 in Confederate money would have purchased the $30 in gold (see p. 41 of the record.)

IV. The idea of the plaintiff in error that the Virginia Adjustment Act, authorizing the introduction of parol testimony, is a violation of the Federal constitution, prohibiting any State from impairing the obligation of contracts (see p. 41 of the record), cannot by possibility be sustained. This act, so far from impairing contracts, is in *furtherance* of contracts. It permits parol evidence to be introduced "to show * * what was the true understanding and agreement of the parties, either expressed or to be implied," with a view of enforcing the agreement when so ascertained (see Satterlee vs. Matthewson, 2 Peters, p. 380).

Town of Danville vs. Pace, (25 Grattan, p. 10):

The jury in this case, obeying the instructions of the court, did not scale the bonds by the property standard, and, therefore, what the plaintiff in error says on pages 41–42 of the record as to adjusting contracts for the sale of property by reference

to the value of the property sold is wholly irrelevant. The contract was not adjusted "by reference to the value of the property sold," but the value of the property was simply proved to throw light upon the kind of currency in which, under the contract, it was to be paid for.

V. It is a well established and well-known principle of law, governing all courts, that an appellate court will not interfere with the verdict of a jury, and the judgment of the court trying the case, unless they be plainly and unmistakeably erroneous. To warrant such a thing the "deviation" from the evidence must be "gross and palpable," (see Burgh vs. Shanks, 5 Leigh, 598, and Read's case, 22 Grattan, p. 942.)

Even the *lower* court will not interfere with the verdict "unless manifest wrong and injustice has been done, or unless the verdict is plainly not warranted by the facts proved," (see Blosser vs. Harshbarger, 21 Grattan, page 214). And the indisposition and the impropriety of interfering with the verdict and judgment of an inferior court by an appellate court are still greater. See cases cited just above.

And it certainly cannot be said that the verdict in this case, treating the bonds in suit as valid, is a "gross and palpable deviation" from the evidence.

The foregoing views had been taken when the brief of the counsel for the plaintiff in error was handed to us. We have anticipated most of the points made on the other side. Yet there are some of them which we desire to notice in the way of reply.

1. It seems to us that there is a fallacy running through the whole brief of the Counsel for the plaintiff in error. They treat the paper writing of the 5th Dec'r, 1863, not as the *written evidence* of the agreement then made between Rives

and Peyton, but as the *agreement* itself. Hence among other things they fall into the error of treating the Virginia statute permitting parol evidence to be introduced to ascertain the "true understanding and agreement of the parties" as impairing the obligation of contracts because the effect of it may be to show that the "*true* understanding and agreement" of the parties is different from what it might be held to be if the parties were restricted to the written evidence in regard to it. As already stated, this additional evidence, so far from impairing the obligation of the contract, enables the court, called upon to enforce it, to ascertain what the contract really is. It ascertains and establishes the contract. It neither impairs nor destroys it.

If such a statute as this Virginia statute were unconstitutional, then all the legislation of the States, and of England, making parties competent to testify, who were incompetent when the contracts were made, would be unconstitutional for the same reason. It is hardly necessary to cite authorities to show the power of a legislature to so change the rules of evidence as to permit parol evidence, *not before* admissible, to be introduced to explain or vary the written evidence of the contract. But if authorities are wanted on this point, we refer to Cooley on Constitutional Limitations, page 367, and to Crawford v. Halstead, 20 Grattan, 211, and Hilb v. Peyton, 22 Grattan, 564–5.

The Counsel seem to think that parol evidence is proper to show "what kind of dollars the parties meant," where the word dollars is used generally, (see p. 16 of brief); but that parol evidence is improper to show what is meant by such words as "bankable currency of the day." The rule prior to the decision in Thorington v. Smith seems to have been rather the other way, for Mr. Phillips, counsel for the appellant in that case, (see 8 Wallace p. 5,) says, "the cases are numerous where the struggle has been made to introduce parol evidence to explain the meaning of words, regarded by the court of doubtful import; such as 'current funds,'

'current bank notes,' 'currency.' But where, as in this case, a party has promised to pay so many 'dollars,' no authority will sanction evidence of an agreement that dollars meant not what the law says it meant, but something very different, to-wit: Confederate treasury notes."

But Chief Justice Chase, speaking in that case for an undivided court, held that the parol evidence was properly admitted to explain what "dollars" meant. And this court, in the Confederate Note case, 19 Wallace, cited by plaintiff's counsel, also held that at common law parol evidence was admissible to prove that "dollars" used in a contract made during the war meant Confederate notes—it being also held in that case that "the understanding of the parties may be shown from the nature of the transaction, and the attendant circumstances, as satisfactorily as from the language used." And if proper in the case of "dollars," it is *a fortiori* proper in the case of such words as "bankable currency of the day."

In the case of Hilb v. Peyton, (see 21 Grattan, p. 387) the bond sued on was in these words and figures, to-wit:

"$5,000. Two years after date, for value received, we promise and bind ourselves jointly and severally to pay Simon H. Hilb, his heirs and assignees, the sum of five thousand dollars, without interest, and in such funds as the banks receive and pay out."

Parol evidence was declared by the court (see 22 Grattan, p. 550) to be properly admissible to show what funds were meant—whether funds received and paid out by the banks at the date of the bond, or funds received and paid out by the banks at the maturity of the bond, and, even if the latter were meant, then whether the bond still meant such *Confederate* funds, and those only, as the parties contemplated might be so received and paid out at the maturity of the bond. And so in our case parol evidence is properly admissible to show what is meant by the words "bankable currency of the day." Plaintiff's counsel say there is no ambiguity here—that the parties contracted for the "bankable currency of the day,"—but of *what day?* Just here the ambiguity comes in. The Hilb

and Peyton contract was for bankable funds, but as of *what time* was the question to be solved by the parol testimony received and considered in connection with the *writing* itself.

It cannot be said that ambiguity in our bonds as to "the day," is removed by the reference therein made to the agreement of the 5th of December, 1863, for, whilst the bonds follow the agreement so far as calling for "the bankable currency of the day" is concerned, they do not follow the agreement so far as giving Rives the right to "choose his own time for the call" is concerned. So we must look to the bonds, unaided by the agreement, for the meaning of these words, and it is proper that we should have all the aid that parol evidence can give us.

The plaintiff's counsel, recognizing the fact that the provision in the agreement that Rives might "choose his own time for the call" does not appear in the bonds, endeavor to show that the words, "the said demand shall be made in writing by said George Rives, his heirs or legal representatives only," which do appear in the bonds, are equivalent to them. And they construct quite an ingenious argument upon the use of these words in the bonds (see page 15 of their brief) by making the word "only" qualify "Geo. Rives, his heirs, or legal representatives," instead of treating it, as is really the case, as qualifying the words "in writing"—the true meaning of the language employed being that 'the said demand shall be made in writing only by said Geo. Rives, his heirs or legal representatives.' In this way effect is given to every word employed, whereas the word "only" has no force if it qualifies "Geo. Rives, his heirs, and legal representatives,"—for, without the use of the word 'only,' they alone are the parties to make the "demand." The obligors cannot demand payment of *themselves*. The provision that the demand should be made in writing only was inserted in the bonds *for the benefit of the obligors*—it being important to them to have the *time* of demand *fixed* beyond controversey by a *written* demand upon them, as from that time the one and two years' credit was to begin to run, if they elected to claim it. If the demand was a verbal one there would always be some uncertainty as to when it was made, which would lead to confusion, and probably to controversy.

The view taken by plaintiff's counsel (p. 16 of brief) that the decision of the Virginia Court of Appeals in Hilb vs. Peyton (made by a full court) as to the construction of the Virginia statute is not binding upon this court according to its well-known rule is rather a peculiar one. The fact that Hilb vs. Peyton was twice heard, and twice argued, and considered more maturely than is usual, is an additional reason why this court should respect and follow the decision finally made in it. Besides, the same decision was made by the Virginia Court in Calbreath vs. Virginia Porcelain and Earthenware Co. *supra*, and is now the settled law of Virginia.

II. The counsel for the plaintiff contend that all of our evidence is irrelevant—and yet on page 18 of their brief concede, as they are bound to do, that evidence is relevant "if it tends to prove the issue." Now, who can doubt that the fact that the thirty-three slaves were worth, in Confederate money, less by $10,000 than the price given for them "*tends* to prove" that the bonds given are payable in Confederate money (then worth only one in twenty), and not in good money?

The language employed by this court in the Confederate Note Case, cited by plaintiff's counsel, shows that this court will not doubt it. The court in that case (see 19 Wallace, p. 559) says: "The understanding of the parties may be shown from the nature of the transaction, and the attendant circumstances, as satisfactorily as from the language used. A contract, for example, to pay $50 for a night's lodging at a house of public entertainment, where similar accommodation was usually afforded for one-twentieth of the sum in coin, accompanied by proof of a corresponding depreciation of Confederate notes, would leave little doubt that the parties had Confederate money in contemplation when the contract was made. In Thorington vs. Smith the land was sold for the nominal sum of $45,000, when its value in coin was only $3,000, a most persuasive fact to the conclusion that Confederate notes were alone intended in the original transaction."

Talk of "*tending* to prove"—why, this court regards such evidence as *proof*—so that we may regard the relevancy of the testimony as shown beyond dispute.

Even if it were conceded (which it is not) that the contract was one of hazard, still the fact that Confederate money was then the only money in circulation where the contract was made would be a strong circumstance to show that the hazard was restricted to the rise or fall of Confederate currency—and that the parties did not contract with reference to the prohibited currency of a government which, under the laws to which the parties were then subject, it was a penal offence to use; and this would be especially the case where there was at the time, as is proved, a general expectation among the people that a better Confederate currency was about to be issued.

And just here let us observe that a contract of hazard is one fraught with hazard to both parties—and, unless you restrict the hazard of the contract in question to the rise or fall of Confederate currency, there was no hazard upon Rives' part. Courts do not favor contracts of hazard, even where the hazard is mutual, and will not enforce them, unless shown to be such by plain and indisputable evidence. See Hilb v. Peyton, 21 Grattan, p. 393. But if the hazard be all on one side, then no court will enforce the contract. Peyton had no *inducement* to take the hazard of paying good money—the hazard of paying 20 to 1 as compared with Confederate money—when $45,000 of Confederate money was ample, and more than ample, to buy 33 such slaves as he purchased from Rives.

Even if Rives understood the contract as his administrator's counsel contend that he did, still if Peyton and his sureties understood it differently, (which they must have done in that case), then there was no "*aggregatio mentium*," and consequently no contract. See 1 Parsons on Contracts, page 6—3d ed'n. Under these circumstances the parties would be remitted to the value of the property, so far as not paid for; and, as the property was worth in Confederate money less than was given for it, the verdict of the jury, and the judgment of the court are for more than Rives' estate is entitled to by this mode of settlement.

III. The counsel for the plaintiff contend that the Judge ought to have kept the case away from the jury, because they say, upon a demurrer to defendant's evidence, the court would have been bound to have held such evidence as insufficient to sustain the defendant's case.

In Pleasants v. Fant, cited by plaintiff's counsel, we find (see 22 Wallace, page 121), the law touching a demurrer to evidence thus laid down:

"In the case of Pawling v. The United States, the court, by Marshall, C. J., said: 'The general doctrine on a demurrer to evidence has been correctly stated at the bar. The party demurring admits the truth of the testimony to which he demurs, and also those conclusions of fact which a jury may fairly draw from the testimony. Forced and violent inferences he does not admit, but the testimony is to be taken most strongly against him, and such conclusions as a jury might justifiably draw the court ought to draw.'"

Now read this in connection with the language employed by this Court in the Confederate Note case, already quoted, and say if the jury *might* not justifiably have drawn from the evidence the conclusion that the bonds were payable in Confederate currency? And if the jury "*might*" fairly have drawn such a conclusion, then the court "ought to draw" it? The jury "might" fairly reach this conclusion in either one of two ways—either by treating the bonds as an ordinary contract payable in Confederate money, or as a contract of hazard based exclusively upon the appreciation or depreciation of Confederate currency.

IV. It is true, as decided in Commissioners, &c., v. Clark, 94 U. S. Rep. 284, cited by plaintiff's counsel, that, according to the practice prevailing in the U. S. Courts, judges are not required to submit a case to the jury "merely because *some* evidence has been introduced by the party having the burden of proof." Yet, at the same time, if the evidence so introduced "tends to maintain," on the part of such party, the issue to be tried, then it is the right of the jury "to pass upon it," "whether weak or strong." See Hickman v. Jones, 9 Wallace, page 201.

And even if the burden were upon us, as contended for by plaintiff's counsel, (which we do not admit to be the case), still as our evidence beyond all cavil tended, and strongly tended, to maintain on our part the issue to be tried, it was properly submitted to the jury.

V. If the contract between Rives and Peyton, and his sureties, were *such* a contract of hazard as plaintiff's counsel contend it was, then it was a *wager* upon the *issue of the war*—and, as such, void for illegality.

It would have placed Peyton and his sureties in a position to struggle, contrary to the laws and policy of the United States Government, for the final overthrow of all federal authority in the seceded States. And such a contract would have been, in like manner, contrary to the policy and laws of the *de facto* government, under which the parties were then living.

No objection on this ground was taken to the contract in the case of Gavinzey vs. Crump, and, therefore, the court stated that it was not a question in that case whether or not that contract was a wagering contract, and therefore void, (see 22 Wallace, page 320).

VI. While we by no means concede that the provision of the Virginia Adjustment Act, that the value of the property sold may be adopted as the means of recovery, is unconstitutional, as is insisted in the brief of plaintiff's counsel, yet we deem it unnecessary to argue that question as the instruction given by the Court forbade the jury to adopt that as the measure of value—the instruction given upon this point being in these words, viz: "And if the jury find from the evidence that the said bonds or writings obligatory were made in reference to Confederate currency, then the plaintiff is entitled to recover the amount stipulated to be paid in such bonds at the value of Confederate money compared with national currency at the time of the making thereof, with interest from the time said bonds, according to their tenor and effect, became payable."

And we deem it unnecessary to enter into an examination to see whether or not any of the instructions asked for by the plaintiff correctly propounded the law, inasmuch as, so far as they may be supposed to have done so, they were embraced in the instructions given by the court, which stated the law of the case fully and clearly, and more favorably for the plaintiff than he was entitled to—in this, that the jury were, in effect, forbidden to take the value of the property as the measure of the recovery.

The second instruction asked for by the plaintiff, and referred to on pages 22–23 of brief, was properly rejected, because, in no event, would the plaintiff be entitled to the face amount of the bonds, less the year's interest credited thereon; for, in the very worst aspect of the case for the defendant, the plaintiff would only be entitled to the value of the national currency as of 1866, or 1867 and 1868, 1866 being the date of Rives' written demand, and 1867 and 1868 one and two years thereafter. In the case of Gavinzey v. Crump, 22 Wallace, (cited by plaintiff's counsel,) the word "dollars" was used, and was held to be lawful dollars, and payable accordingly. In the case at bar, the word "currency" is used, and hence, if the defendant could be held to pay national currency, he should not be called upon to pay the currency of this time, as good as gold, but the currency of 1866, or 1867 and 1868, or its equivalent in value.

Respectfully submitted,

WM. J. ROBERTSON,
R. T. W. DUKE,
S. V. SOUTHALL.

Acts of Assembly
State of Virginia

FILED
MAR 7 1882

THE STATUTE.

CHAP. 71.—An ACT providing for the adjustment of Liabilities arising under Contracts and Wills made between the 1st day of January 1862, and the 10th day of April 1865.

Passed March 3, 1866.

Whereas a depreciated currency, known as Confederate States treasury notes, constituted the only or principal currency in the greater part of this state during the late war: and whereas the result of said war involved the total destruction of said currency: and whereas there are many contracts which were made, or obligations which were incurred before the termination of said war, predicated on said depreciated currency, still remaining wholly or partially unadjusted, in respect to which great uncertainty exists, perplexing alike to debtor or creditor, as to the present measure of their liabilities and rights respectively: and it thus appearing useful that some uniform and equitable rule should be established for the adjustment of such mutual demands and liabilities: Therefore,

1. Be it enacted by the general assembly, That in any action or suit, or other proceeding for the enforcement of any contract, express or implied, made and entered into between the first day of January, eighteen hundred and sixty-two, and the tenth day of April, eighteen hundred and sixty-five, it shall be lawful for either party to show, by parol or other relevant evidence, what was the true understanding and agreement of the parties, either expressed or to be implied, in respect to the kind of currency in which the same was to be fulfilled or performed, or with reference to which, as a standard of value, it was made and entered into: and in an action at law, it shall not be necessary to plead the agreement specially in order to admit such evidence.

2. Whenever it shall appear that any such contract was, according to the true understanding and agreement of the parties, to be fulfilled or performed in Confederate States treasury notes, or was entered into with reference to such notes as a standard of value, the same shall be liquidated and settled, by reducing the nominal amount, due or payable, under such contract, in Confederate States treasury notes, to its true value at the time they were respectively made and entered into, or at such other time as may to the court seem right in the particular case; and upon the payment of the value so ascertained, the party bound by such contract shall be forever discharged of and from the same: provided, that in all cases where actual payment has been made of any sum of such Confederate States treasury notes, either in full or in part of the amount payable under such contract, the party by or for whom the same was paid, shall have full credit for the nominal amount so paid, and such payment shall not be reduced.

3. Where any judgment or decree has been recovered for a specific sum, or for damages, between the said first day of January, eighteen hundred and sixty-two, and the said tenth day of April, eighteen hundred and sixty-five, or shall have been recovered after the said tenth day of April, eighteen hundred and sixty-five, upon a cause of action arising within the said period, and such judgment or decree remain unpaid, it shall be lawful for the courts, in a summary way, on motion, after ten days' notice, either before or after the issue of execution, to fix, settle and direct at what depreciation, or how the said judgment or decree shall be discharged, having regard to the provisions of this act, to the cause of action for which the judgment or decree was recovered, and any other proof or circumstance that, from the nature of the case, may be admissible.

4. In any case wherein it shall appear that on any contract made or liability incurred, on or after the first day of January, eighteen hundred and sixty-two, and before the tenth day of April, eighteen hundred and sixty-five, the debtor, on or after the maturity of the claim against him, and within the period

above mentioned, made to the creditor, his agent or attorney at law, a bona fide and actual tender of the amount due, in the said Confederate States treasury notes, or other equal or better currency, and that the creditor then refused to accept the same, a court of equity may grant relief to the debtor, unless it appear that the creditor was justified in refusing to accept the amount tendered, in consequence of a substantial and decided depreciation of said currency after the time at which payment ought to have been made, and before the time at which the tender was made, or unless it otherwise appear to be inequitable to grant such relief.

5. It shall be lawful for any person bound for any debt, or the performance of any contract, which was to be discharged or performed by the payment of Confederate States treasury notes or for the performance of any contract made with reference to such notes as a standard of value, to tender to the party entitled to demand payment or performance, or damages for nonperformance, the amount demandable according to the provisions of this act; and if such party shall refuse to accept the amount so tendered, it shall be lawful for the party bound, by notice in writing duly served, to require him to institute proper legal proceedings for the recovery of such debt, or the enforcement of such contract, or for the recovery of damages for its nonperformance; and if such party shall fail to institute such proceedings within three months from and after the service of such notice, he shall be forever barred and precluded from all legal remedy whatever, founded upon such debt of contract, to recover more than the sum tendered, without interest.

6. Nothing in this act shall be construed to take away or impair the ordinary jurisdiction of courts of equity.

7. In any suit to recover a legacy bequeathed by a will or codicil executed between the first day of January, eighteen hundred and sixty-two, and the tenth day of April, eighteen hundred and sixty-five, or to enforce any provision of such a will or codicil, it shall be lawful for any party interested to show,

by parol or other relevant testimony, what was the true intention of the testator, either expressed or to be implied, in respect to the kind of currency in which such legacy was to be paid or such provision fulfilled, or in reference to which, as a standard of value, such will or codicil was made. And when it shall appear that any legacy or provision in any such will or codicil was, according to the true intention of the testator, to be paid or fulfilled in Confederate treasury notes, or that such will or codicil was made with reference to such notes as a standard of value, the amount payable for any such legacy or under any such provision, shall be liquidated and settled according to the provisions of this act applicable to liabilities arising out of contracts made between the dates aforesaid; and all the provisions of this act shall be held applicable to legacies or other liabilities arising under such a will or codicil, in like manner as to liabilities arising out of contracts.

8. This act shall be in force from its passage.

CHAP. 270.—AN ACT to amend and re-enact the 1st and 2nd sections of the act passed 3d of March, 1866, entitled an act providing for the Adjustment of Liabities arising under Contracts or Wills made between the 1st day of January, 1862, and the 10th day of April, 1865.

Passed February 28, 1867.

1. Be it enacted, That in any action or suit or other proceeding for the enforcement of any contract, express or implied, made or entered into between the first day of January, eighteen hundred and sixty-two, and the tenth day of April, eighteen hundred and sixty-five, it shall be lawful for either party to show by parol or other relevant testimony, what was the true understanding and agreement of the parties thereto, either express or to be implied, in respect to the kind of currency in which the same was to be fulfilled or performed, or with reference to which

as a standard of value it was made or entered into; and in an action at law, or suit in equity, it shall not be necessary to plead the agreement specially in order to admit such evidence: provided, that when the cause of action grows out of a sale, or renting or hiring of property, whether real or personal, if the court, (or where it is a jury case), the jury think that, under all the circumstances, the fair value of the property sold, or the fair rent or hire of it would be the most just measure of recovery in the action, either of these principles may be adopted as the measure of the recovery instead of the express terms of the contract.

2. Whenever it shall appear that any such contract was according to the true understanding and agreement of the parties, to be fulfilled or performed in Confederate States treasury notes, or was entered into with reference to such notes as a standard of value, the same shall be liquidated and settled by reducing the nominal amount due or payable under such contract in Confederate States treasury notes to its true value at the time they were respectively made and entered into, or at such other time as may to the court, or if it be a jury case, to the jury seem right in the particular case: and upon the payment of the value so ascertained, the party bound by such contract shall be forever discharged of and from the same: provided, that in all cases where actual payment has been made of any sum of such Confederate States treasury notes, either in full or in part, of the amount payable under such contract, the party by or for whom the same was paid, shall have full credit for the nominal amount so paid, and such payment shall not be reduced.

3. This act shall be in force from its passage

RIVES, ADM'R
against
DUKE, ADM'R,
} No. 156.

Extract from Code of Va., 1873, ch. 168, §4 and §5, p. 1099.

Of Payment and Setoff.

Payment or setoff may be allowed, if described in plea or account; as to setting off, when claim is against several, debt to one of them

4. In a suit for any debt, the defendant may at the trial prove, and have allowed against such debt, any payment or setoff which is so described in his plea, or in an account filed therewith, as to give the plaintiff notice of its nature, but not otherwise. Although the claim of the plaintiff be jointly against several persons, and the setoff is of a debt not to all but only to a part of them, this section shall extend to such setoff if it appear that the persons, against whom such claim is, stand in the relation of principal and surety, and the person entitled to the setoff is the principal.

Special plea of setoff; proceedings thereupon; as to effect of this chapter on voluntary bonds.

5. In any action on a contract, the defendant may file a plea, alleging any such failure in the consideration of the contract, or fraud in its procurement, or any such breach of any warranty to him of the title or the soundness of personal property, for the price or value whereof he entered into the contract, or any other matter as would entitle him either to recover damages at law from the plaintiff, or the person under whom the plaintiff claims, or to relief in equity, in whole or in part, against the obligation of the contract; or if the contract be by deed, alleging any such matter arising under the contract, existing before its execution, or any such mistake therein, or in the execution thereof, or any such other matter as would entitle him to such relief in equity; and in either case alleging the amount to which he is entitled by reason of the matters contained in the plea. Every such plea shall be verified by affidavit.